

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

VALENTINO MAGHEE,

Petitioner,

vs.

JOHN AULT, Warden,

Respondent.

No. C 99-0084-MWB

C 99-0087-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION**

In this action, petitioner Valentino Maghee seeks *habeas corpus* relief pursuant to 28 U.S.C. § 2254 from two disciplinary proceedings at the Anamosa State Penitentiary (ASP) as the result of which Maghee lost a total of 32 days of good conduct time. In one disciplinary proceeding, Maghee was found guilty of violating prison rules prohibiting gambling, obstructive or disruptive conduct, and possession of gambling materials. In the other disciplinary proceeding, Maghee was found guilty of violating a prison rule prohibiting sexual misconduct on the basis of a sexually suggestive birthday card Maghee left for a nurse at the prison "pill room." In the second proceeding, Maghee contended that the birthday card was not intended for the nurse, whose first name was Tammy, but for a girlfriend in Des Moines named Tammy Sheeler, but the administrative law judge hearing the prison disciplinary action rejected that contention. Maghee obtained no relief in state court post-conviction relief proceedings. Therefore, in June 1999, Maghee filed two separate actions for *habeas corpus* relief in this federal court. The actions were consolidated. In both actions, Maghee contends that he was denied due process when he was prevented from calling witnesses to testify at the disciplinary hearings.

Magistrate Judge Paul A. Zoss filed a Report and Recommendation on April 26,

2001, recommending that relief be denied in both actions. Judge Zoss concluded, *inter alia*, that “[n]either of the records of the disciplinary hearings indicates Maghee requested witnesses, and the [post-conviction relief] court concluded there was no evidence to support Maghee’s contention that he was denied the right to call witnesses.” Report and Recommendation, 14. Judge Zoss concluded that the decision of the Iowa court denying post-conviction relief was in accordance with applicable United States Supreme Court precedent, did not represent an unreasonable application of the law to the facts of this case, or constitute an unreasonable determination of the facts in light of the evidence. *See id.*; *see also* 28 U.S.C. § 2254(d) (grounds for *habeas corpus* relief). Maghee filed one objection to the Report and Recommendation, through counsel, on May 21, 2001.¹

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge’s report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, the plain language of the statute governing review provides only for *de novo* review of “those portions of the report or specified proposed findings or recommendations

¹ Judge Zoss granted Maghee’s application for leave to file his objections out of time.

to which objection is made.” 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings or recommendations to which no objections are filed are reviewed only for “plain error.” See *Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for “plain error” where no objections to the magistrate judge’s report were filed).

Maghee has filed one objection requiring *de novo* review in this case, which consists of the following:

1. Page 14 of the report and recommendation, the Honorable Paul A. Zoss, Magistrate Judge, United States District Court found that there was no evidence to support the position that the Petitioner had been denied his constitutional right to call witnesses. In reviewing the entire record provided to counsel, there is no written showing that Mr. Maghee formally requested that a witness be made available. However, Mr. Maghee’s version of the event in the inmate comments portion of the Anamosa State Penitentiary disciplinary hearing reports makes reference to Tammy Sheeler and states an address of 2806 Cottage in Des Moines. Counsel believes that this is evidence to indicate that he wished to have her available to testify on his behalf. However, counsel concedes that no other evidence relating to the specific request that she be a witness exists except for Mr. Maghee’s testimony on the matter. A copy of the disciplinary hearing report is attached as Attachment 1.

Petitioner’s Objection To Report And Recommendation Of Magistrate, ¶ 1. Maghee asserts that calling Ms. Sheeler as a witness in the disciplinary proceedings would not have caused a threat of harm to the facility and that there was therefore no reason not to allow her to appear as a witness in the disciplinary proceedings. *Id.* at ¶ 2. The court finds that this objection goes only to Maghee’s attempt to obtain relief from the loss of good conduct time for sexual misconduct, not to his attempt to obtain relief from disciplinary action for gambling.

Although Maghee states that he attached a copy of “the disciplinary hearing report”

to his Objection, he instead attached a copy of Judge Zoss's Report and Recommendation. See Petitioner's Objection To Report And Recommendation Of Magistrate, Exhibit 1. However, a copy of the disciplinary hearing report concerning the charge of sexual misconduct appears in the record as page 10 of the documents attached to Maghee's Brief In Support Of Application For Writ Of Habeas Corpus. That disciplinary hearing report, dated October 29, 1997, states the following in the first paragraph of the "Inmate Comments" section:

Inmate Maghee said he had no intention to give it to RN Hughes. He said he knows someone by the name of Tammy Sheeler who lives at 2806 Cottage in Des Moines. He said this is a girlfriend, and her birthday is October 28. He does not know her phone number. She is not on his visiting list. It was pointed out that he was late in sending her a birthday card, and he acknowledged that.

Petitioner's Brief In Support Of Application For Writ Of Habeas Corpus, Attachments at 10. Upon *de novo* review, the undersigned agrees with Judge Zoss that, even in light of Maghee's assertion that he intended the birthday card for a different "Tammy," there is nothing in the record making it unreasonable for the state post-conviction relief court to find that Maghee made no request for the "other Tammy" to appear as a witness in the prison disciplinary proceedings. See 28 U.S.C. § 2254(d)(2). Thus, there is no basis in the record for Maghee's contention that his due process rights were violated by denial of his right to call witnesses in that prison disciplinary proceeding. The court will therefore accept Judge Zoss's recommended findings and recommendations concerning denial of relief as to the loss of good conduct time for sexual misconduct.

The court has reviewed Judge Zoss's findings on and recommended disposition of issues to which no timely objection was made and finds no "plain error" therein. See *Griffini*, 31 F.3d at 692 (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed).

THEREFORE,

1. Petitioner's May 21, 2001, Objection to Judge Zoss's April 26, 2001, Report and Recommendation is **overruled**.

2. Judge Zoss's April 26, 2001, Report and Recommendation is **accepted**. Relief is therefore **denied** on Maghee's applications for *habeas corpus* relief in Cases Nos. C 99-0084-MWB and C 99-0087-MWB. **Judgment** in favor of the respondent shall accordingly enter in both actions.

3. Finding no substantial showing of the denial of a constitutional right, *see* 28 U.S.C. § 2253(c); *see also* *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir.), *cert. denied*, ___ U.S. ___, 121 S. Ct. 254 (2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir.), *cert. denied*, 525 U.S. 1007 (1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998), *cert. denied*, 525 U.S. 1166 (1999); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998), a certificate of appealability is also **denied** in both actions.

IT IS SO ORDERED.

DATED this 30th day of July, 2001.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA